RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

BANKS AND BANKING — NATURE OF SAVINGS-BANK. — A savings-bank in Massachusetts is an incorporated agency for receiving the moneys of depositors in small or moderate amounts and investing them merely for the use and benefit of the depositors. The bank assumes no obligation to repay to any depositor the full amount of his deposit, and, in case of loss from an investment carefully and lawfully made, it must be borne *pro rata* by the depositors. *Lewis* v. *Lynn Inst. for Savings*, 19 N. E. Rep. 365 (Mass.).

COMMON CARRIERS — MALICIOUS NEGLIGENCE OF EMPLOYEE — EXEMPLARY DAMAGES. — A railway company is liable in exemplary damages for the malicious or reckless negligence of its servants, in the course of their employment, although such negligence be not authorized or approved by the company. *Quinn* v. *South Carolina Ry. Co.*, 7 S. E. Rep. 614 (S. C.).

COMMON CARRIERS — RAILWAY TICKET — SEPARATION OF COUPON. — Where the coupon of a railway ticket, perforated for the purpose of separation, and conditioned to be void if detached, became separated through no fault of the passenger, it was *held* that this separation was not such a detachment as would work forfeiture of the contract. *Wightman* v. *Chicago & N. W. Ry. Co.*, 40 N. W. Rep. 689 (Wis.).

CONFLICT OF LAWS — PUBLIC POLICY OF A STATE — ASSIGNMENTS PREFERRING CREDITORS. — A statute of S. C. provides that assignments preferring certain creditors shall be void. Such an assignment was executed in N. Y. by a citizen of N. Y. conveying personal property in S. C. *Held*, that as such assignment was contrary to the public policy of the State, it was void in S. C., though by the law of N. Y. such preference is not only permitted but required, and though none of the creditors attaching it reside in S. C. *Sheldon* v. *Blanvelt*, 7 S. E. Rep. 593 (S. C.).

CONSTITUTIONAL LAW — INTERSTATE COMMERCE. — Transportation by continuous carriage, from a point in one State over connecting lines which pass through another State back to a point in the original State, and one of which connecting lines lies wholly in such other State, is interstate commerce within the meaning of the Constitution of the U. S. *Sternberger* v. *Cape Fear & Y. V. Ry. Co.*, 7 S. E. Rep. 836 (S. C.).

CONSTITUTIONAL LAW — TONNAGE DUTY — OYSTER DREDGING. — A Maryland statute imposed a tax of three dollars per ton upon all vessels employed in dredging for oysters in the State waters. *Held*, that this was not a tonnage duty, but a lawful compensation demanded by the State, as the proprietor of the oyster beds, for the privilege of taking oysters; and that it was but reasonable that this compensation should be rated according to the size of the vessel used. *Dize* v. *Lloyd et al.*, 36 Fed. Rep. 651 (Md.).

CRIMINAL LAW — ASSAULT — HUSBAND AND WIFE — VENEREAL DISEASE. — A husband who, being aware that he has a venereal disease, has connection with his wife who is ignorant of his condition, and communicates the disease to her, cannot be convicted under a statute of "an assault occasioning actual bodily harm." *Reg.* v. *Clarence* (Cr. Cas. Res.), 59 L. T. Rep. N. S. 780 (Eng.).

Eight judges, for one reason or another, agreed in the decision; four judges dissented. Seven opinions were delivered. The principal propositions advanced by various of the majority were as follows: First, that there can be no assault by means of infection; second, that the concealment by the husband of his condition was not such fraud as vitiated the wife's consent; and third, that if fraud in question could vitiate the consent to the contamination, it would also vitiate the consent as to the intercourse, these not being separable (*Hegarty* v. *Shine*, 14 Cox C. C. 124, at 145), and the result would be that the husband would be guilty

of a rape upon his wife, which is impossible on account of the fundamental idea of the marriage relation (Hale's Pl. Cr. 628).

The minority, on the contrary, expressed the following various opinions: First, that there can be an assault by infection; second, that the husband's fraud vitiated the wife's consent *in toto;* and, third, that even if his fraud did not vitiate her consent as to the act of intercourse, still it did vitiate her consent as to the contamination by disease, these being separable (*Reg.* v. *Bennett*, 4 F. & F. 1105; *Reg.* v. *Sinclair*, 13 Cox C. C. 28); and that, therefore, although the husband could not be convicted of a rape upon his wife, still he could be convicted of an assault by way of infection.

Mr. Justice Stephen, who was of the majority, in discussing the application of the maxim that "fraud vitiates consent" in the similar cases of *Reg.* v. *Flattery*, 2 Q. B. D. 410 and *Reg.* v. *Dee*, 14 Ir. L. C. L. 468, said that "the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape, are frauds as to the nature of the act itself, or as to the identity of the person who does the act."

CRIMINAL LAW — HOMICIDE — IRRESISTIBLE IMPULSE. — Mere irresistible impulse, though arising from mental derangement, is not a defence to an indictment for murder, provided the accused knew that the act which he was committing was a crime, morally, and punishable by the laws. *State* v. *Alexander*, 8 S. E. Rep. 440 (S. C.).

This case seems to indicate a disposition on the part of our courts to do away entirely with this defence.

EVIDENCE — JUDICIAL NOTICE — RAILROAD LINES. — The court has judicial knowledge of the fact that certain railroads touch the same points, and are practically parallel, and necessarily competing, lines. *Gulf, C. & St. F. R. R. Co.* v. *State*, 10 S. W. Rep. 81 (Tex.).

EVIDENCE — PROMISSORY NOTE — CONDITION SUBSEQUENT BY PAROL AGREEMENT. — Evidence is admissible that a promissory note, delivered to the payee, was executed in contemplation of a proposed transaction and with a collateral oral agreement that it should become of no effect if the maker's attorney should disapprove of the transaction; and such note is rendered void upon expression of the attorney's disapproval. *Ware* v. *Allen*, 9 Sup. Ct. Rep. 174.

This is, it is to be noticed, the case of a condition subsequent. That it is permissible to introduce evidence of a separate oral agreement constituting a condition precedent to any liability under a written contract, see note to case of *Meekins* v. *Newberry*, digested in 2 HARV. L. REV. 289.

FEDERAL COURTS — JURISDICTION — DOMICILE OF CORPORATIONS. — U. S. Act, March 3, 1887, provides that an action shall be brought in no other district than that of which defendant is an inhabitant. *Held*, that a railway corporation is an inhabitant only of the State which created it, and federal courts elsewhere will not take jurisdiction of an action against it. *Filli* v. *Delaware, L. & W. R. Co.*, 37 Fed. Rep. 65 (N. Y.).

FEDERAL COURTS — PRECEDENTS — FOLLOWING STATE DECISIONS. — When the construction of a State constitution or statute involves no federal question, and has been settled by the decision of the highest tribunal of the State, it is a general rule of decisions in the federal courts to follow and adopt such decision; and this rule is to be followed even where the U. S. Supreme Court has given a different construction to the State law. There are, however, exceptions to this rule; first, when rights of property have been acquired under former decisions; secondly, when on the same transactions the federal court has first passed, and the decisions of the State court relied upon do not meet the independent judgment of the U. S. Supreme Court; and, thirdly, when general questions of commercial law are involved. Perhaps there is also an exception in cases involving controversies between citizens of different States. *New Orleans Water Works* v. *Brewing Co.*, 36 Fed. Rep. 833 (La.).

The above rule, it would seem, is discretionary, and will not be followed so strictly as to violate the demands of truth and justice. See *Gelpcke* v. *City of Dubuque*, 1 Wall. 175.

HUSBAND AND WIFE — HUSBAND MAY ENFORCE WIFE'S CONTRACT WITH HIMSELF. — A statute of Indiana gives a married woman a right to contract as to her personal property, and carry on her separate business as if sole, except in certain particulars. *Held*, that a husband could recover on an express con-

tract made by his wife to repay money loaned to her by him for a proper use in her separate business. But "the husband must show, not only an express contract, but also that in equity and good conscience he is entitled to enforce his claim. The contract is not valid in the sense that it can be enforced strictly as contract. This is so, because in strict law the . . . theory of the unity of person still exists." *Harrell* v. *Harrell*, 19 N. E. Rep. 621 (Ind.).

As to partnerships between husband and wife see *Toof* v. *Brewer*, 3 So. Rep. 571 (Miss.), digested 2 HARV. L. REV. 99.

INFANT — CONTRACT FOR BENEFIT OF INFANT. — An infant contracted to perform services for another, under terms beneficial to himself. *Held*, that he was bound by the contract, and an injunction was granted to prevent him from breaking its negative stipulations. "There can be no doubt that an infant may enter into a contract which is beneficial to himself, and is bound by it." *Leslie* v. *Fitzpatrick*, 3 Q. B. D. 229 (an action against an infant for damages arising for breach of contract), gives the correct test of the contract. Whether the provisions "are inequitable or not depends on considerations outside the contract. If such provisions were at the time common to labor contracts, or were in the then condition of trade such as the master was reasonably justified in imposing as a just measure of protection to himself, and if the wages were a fair compensation for the services of the youth, the contract is binding, inasmuch as it was beneficial to himself by securing to him permanent employment, and the means of maintaining himself." *Fellows* v. *Wood*, 59 L. T. Rep. N. S. 513 (Q. B. D.); S. C. 39 Alb. L. J. 76 (Eng.).

JUDICIAL SALE — FAILURE OF PURCHASER TO COMPLY WITH BID. — Where, at a sale of property under order of the court, for the benefit of creditors, a purchaser, after his bid has been accepted and the sale reported, refuses to comply with the terms of his bid, the court may, without confirming the sale to him, order a resale of the property, and after such resale enter a decree against him for the deficiency between his bid and the proceeds of the resale, with costs. *Camden* v. *Mayhew*, 9 Sup. Ct. Rep. 246.

JURY — METHOD OF ESTIMATING DAMAGES. — It is proper for a jury, in an action for unliquidated damages, to add together the amounts named by the several jurors, and divide the sum by twelve, and then to adopt the result as their verdict; but such method must not be made use of pursuant to an agreement to be bound by the result. *City of Kinsley* v. *Morse*, 20 Pac. Rep. 222 (Kan.); *Hunt* v. *Elliott*, 20 Pac. Rep. 132 (Cal.).

The propriety of recommending such a proceeding to the jury is briefly discussed in *Thomas* v. *Dickinson*, 12 N. Y. 364, 372.

LIEN — CONSTRUCTIVE TRUST — MINGLING OF FUNDS. — Defendant, having innocently received money paid him by the plaintiffs through mistake and mingled it with his own, spent a part of the whole amount and bought land with the remainder. *Held*, that "a constructive trust would arise upon the land, had the transaction been between citizens of the United States," but that the plaintiffs, being aliens, could not, under the laws of Texas, claim a resulting or constructive trust in the land, but were entitled to a lien on the land for the amount furnished. *Zundell et al.* v. *Gess*, 9 S. W. Rep. 879 (Tex.).

It would seem notwithstanding the *dictum* of the court, that, under the circumstances of the case, if the plaintiffs had been citizens they would have been entitled to no more, for it does not appear that there was any *wrongful* dealing with the plaintiffs' property from which the law could raise a trust in the strict sense of the word.

NEGLIGENCE — DECEIT — MISREPRESENTATION — CARELESS STATEMENTS. — The solicitors of the plaintiff, the intending mortgagee of property, required the owner to obtain a valuation of the property. The owner employed the defendants, a firm of valuers, who, knowing the purpose for which the valuation was to be used, carelessly fixed a value, which they had no reasonable ground to believe to be correct, and informed the plaintiff's solicitors of their valuation. The plaintiff, acting on the advice of his solicitors, and induced by the representations of the defendants, advanced money upon the security of a mortgage of the property. The mortgagor having defaulted in payment, and the property proving to have been greatly overvalued, and insufficient to answer the mortgage, it was *held* that the plaintiff could recover from the defendants for the damage sustained by him. The decision was put on two grounds, entirely independent

of a contract relation: first, that under the authority of *Heaven* v. *Pender*, 11 Q. B. D. 503, and *George* v. *Skivington*, L. R. 5 Ex. 1, the defendants having knowingly put themselves in the position of furnishing the plaintiff a document, called a valuation, upon the basis of which he was to act, incurred, in point of law, a duty towards him to use reasonable care in its preparation, and were liable to him for negligence in the performance of this duty; and, secondly, that, on the authority of *Peek* v. *Derry*, 37 Ch. D. 541 (digested 2 HARV. L. REV. 189), when a man makes an untrue statement to another, with an intention that it shall be acted upon, and without reasonable grounds for believing it to be true, he is liable in damages, in an action for deceit, to the person acting on his statement. *Cann* v. *Willson*, 39 Ch. D. 39; s. c. 59 L. T. Rep. N. S. 723 (Eng.).

For discussion of this case see note *supra*, in present number of the REVIEW.

NOVATION. — The assent of the creditor is a necessary element in the substitution of a new for an old debtor. To constitute such a novation there must be a mutual agreement between all three parties, whereby at the same time the old debt is extinguished and the new debt is created. *Cornwell* v. *Megins*, 40 N. W. Rep. 610 (Minn.).

PARTNERSHIP — INFANT PARTNER. — Firm property may be held for the debts of a firm although one of the partners is an infant; but the infant may repudiate all personal liability on the firm debts. *Pelletier* v. *Conture*, 19 N. E. Rep. 400 (Mass.).

This decision seems to recognize that, so far as responsibility for debts is concerned, the firm is an entity distinct from the individual partners, who may or may not have the capacity to incur personal liability.

PATENTS FOR INVENTIONS — DURATION — PRIOR FOREIGN PATENTS. — U. S. Rev. St., § 4887, provides that every patent for an invention previously patented in a foreign country "shall expire at the same time with the foreign patent," and shall not remain in force more than seventeen years. Act Canada, 1872, permits the holder of a five-year patent to obtain, as a matter of right, on payment of a fee, two subsequent extensions, of five years each. A Canadian patent for five years having been granted on an invention, a United States patent was granted on the same invention for seventeen years. The Canadian patent was subsequently renewed for the two additional terms of five years. *Held*, the fifteen-years term of the Canadian patent having been continuous, that the United States letters-patent continued valid during its entire duration, and expired at the end of the fifteen years.

Blatchford, J.: Although "the United States patent may on its face run for seventeen years from its date, it is to be so limited by the courts, as a matter to be adjudicated on evidence *in pais*, as to expire at the same time with the foreign patent, not running in any case more than seventeen years; but, subject to the latter limitation, it is to be in force as long as the foreign patent is in force." *Bate Refrigerating Co.* v. *Hammond Co.*, 9 Sup. Ct. Rep. 225.

This decision overrules various Circuit Court cases cited in the opinion.

QUASI CONTRACT — MONEY PAID UNDER MISTAKE OF FACT — STATUTE OF LIMITATIONS — DEMAND. — When a bank, upon which a check is drawn payable to a particular person, pays the amount of the check to one presenting it with a forged indorsement of the payee's name, both parties supposing the indorsement to be genuine, the right of action of the bank to recover back the money from the person so obtaining it, accrues immediately upon payment of the money, without a demand for its repayment, and is barred within six years from that date by a statute limiting actions on contracts and obligations, express or implied. *Leather Manufacturers' Ntl. Bank* v. *Merchants' Bank*, 9 Sup. Ct. Rep. 3.

For the contrary view, that where money has been paid under a mutual mistake of fact, no right of action accrues until a demand has been made for its repayment, see, in addition to the cases discussed in the above opinion, the case of *Freeman* v. *Jeffries*, L. R. 4 Ex. 189; s. c. 1 Keener's Cases on Quasi Contracts, 416; also Prof. Keener's article on "Recovery of Money Paid under Mistake of Fact," 1 HARV. L. REV. at p. 218.

REAL PROPERTY — RULE AGAINST PERPETUITIES — EVIDENCE THAT WOMAN IS PAST CHILDBEARING. — Where, in a will, a gift to the testator's great-grandchildren is, on its face, void for remoteness, evidence is not admissible to show that at the time of the testator's death his daughter was over sixty years of age, and past the age of childbearing, so that the gifts to her great-grandchildren must, as a matter of fact, vest within the time required by the Rule against Perpetuities. *Re Dawson; Johnston* v. *Hill*, 59 L. T. Rep. N. S. 725 (Eng.).

This decision follows *Jee* v. *Audley*, 1 Cox, 324, and *Re Sayers' Trusts*, L. R. 6 Eq. 319, and overrules the later case of *Cooper* v. *Laroche*, 17 Ch. D. 368. See also, in accord with the present decision, Gray on Perpetuities, §§ 215, 215*a*, in which these cases are discussed, and the rule laid down that, "for the purpose of determining questions of remoteness, men and women are deemed capable of having issue so long as they live."

REAL PROPERTY — TENANCY BY ENTIRETY — STATUTES RELATING TO MARRIED WOMEN. — The statutes which allow a married woman to own separate property do not change the common-law rule, that a deed of real estate to a man and his wife conveys a tenancy by entirety. *Baker* v. *Stewart*, 19 Pac. Rep. 904 (Kan.). An elaborate dissenting opinion was rendered.

STATUTE OF FRAUDS — AGREEMENT MADE IN COURT. — An agreement made in open court, and acted upon by the court, is not within the Statute of Frauds. *Savage* v. *Blanchard*, 19 N. E. Rep. 396 (Mass.).

STATUTE OF LIMITATIONS — ADVERSE POSSESSION — COLOR OF TITLE. — Color of title is not such adverse possession as will bar, under the Statute of Limitations, an action of ejectment. *Turner* v. *Stephenson*, 40 N. W. Rep. 735 (Mich.).

TELEGRAPH COMPANIES — FAILURE TO DELIVER MESSAGE — NOTICE. — Action by the receiver for delay in delivering the following message: "Willie died yesterday evening at six o'clock; will be buried at M., Sunday evening." *Held*, that, in the absence of notice to the operator, damages must be limited to the injury that would naturally and apparently result from delay in sending such a message, and that injury to fraternal feelings cannot be taken into account, there being nothing in the message to show that the receiver was the brother of the deceased. *Western Union Tel. Co.* v. *Brown*, 10 S. W. Rep. 323 (Tex.).

The general right of the receiver to recover for damages resulting from delay has been universally allowed in this country and denied in England. (Gray on Telegraphs, §§ 72, 73.)

The case is opposed to the general rule that for mental anguish alone a party cannot recover either in tort or contract (Wood's Mayne on Damages, 1st Am. ed., § 54, n.), but follows earlier Texas decisions. *Relle* v. *W. U. T. Co.*, 55 Tex. 308. See, however, *contra*, *Russel* v. *W. U. T. Co.*, 19 N. W. Rep. 408.

TROVER — REMOVAL OF GOODS BY TEAMSTER IN GOOD FAITH. — Plaintiff hired a room and left goods there without fastening the door. Defendant, a job teamster, in good faith removed the goods under the direction of the owner of the house, and delivered them to the latter at another place. *Held*, that defendant was not liable for conversion. It is settled that whoever receives goods from one in actual, though illegal, possession, and restores them to such person, is not liable. The principle may be extended to the present case, where the goods were received from one having apparent control, accompanied with capacity of investing himself with actual physical possession. *Gurley* v. *Armstead*, 19 N. E. Rep. 389 (Mass.).

TROVER — WAREHOUSEMAN — COURSE OF BUSINESS. — A warehouseman who receives mortgaged goods for storage, and afterwards delivers them to a third person, on production of the warehouse receipt, is liable to the mortgagee, whose mortgage is recorded in another county, although he has no notice of the claim. *Hudmon* v. *DuBose*, 5 So. Rep. 162 (Ala.).

In England, "a merely ministerial dealing with goods at the request of the apparent owner having actual control of them, is not conversion." Pollock, Torts, 293; *Greenway* v. *Fisher*, 1 C. & P. 190 (Packer); *Hollins* v. *Fowler*, L. R. 7 H. L. 757, at 767–8, *semble*.

TRUSTS — CHARITABLE TRUSTS — EFFECT OF CHURCH LAWS AND CANONS. — Archbishop Purcell, of Ohio, in 1879 made an assignment, in his individual capacity, of all his property for the payment of his debts, expressly excepting all property held by him in trust for others. Certain property was vested in him to hold according to the laws and canons of the Roman Catholic Church for the use of priests and their congregations, schools and their teachers, for sisters of charity and orphans in their charge, together with certain land for use as burial-places. None of the beneficiaries were incorporated societies, and they were constantly changing; moreover, the Archbishop, without opposition from any one concerned, had frequently exercised acts of dominion over property so coming to him, both selling and substituting other property. *Held*, that there

was a valid trust for proper purposes. The unincorporated bodies mentioned, although their membership was constantly changing, were sufficiently identified as *cestuis*, and they were properly represented by prominent members, suing in behalf of themselves and others. The nature of the Archbishop's interest was permitted to be shown by the laws and canons of the church, although some of them ran back for fifteen centuries. *Mannix* v. *Purcell*, 19 N. E. Rep. 572 (Ohio).

WILLS — ATTESTATION. — In New York, either an attesting witness to a will must see the testator sign his name, or the testator, exhibiting the signature to the witness, must acknowledge it to be his. Consequently an attestation is insufficient, if the will is so folded that the witness cannot see the signature, although the testator acknowledges the instrument to be his last will and testament. *In re Mackay's Will*, 18 N. E. Rep. 433 (N. Y.).

WILLS — MENTAL CAPACITY OF TESTATOR. — A testator is mentally competent if he have mind enough to understand the nature of the transaction in which he is engaged, and be mentally capable of recollecting the property which he means to dispose of, the objects of his bounty, and the manner in which he wishes to distribute it among them. *Kerr* v. *Lunsford*, 8 S. E. Rep. 493 (W. Va.).

REVIEWS.

AMERICAN CONSTITUTIONAL LAW. By J. I. Clark Hare, LL.D. In two volumes. Little, Brown, & Co., Boston, 1889. 8vo. Pages 1,400.

No apology is needed for a new work on constitutional law, for however able the past treatises have been, the subject is one of such constant development that the method of annotation is unsatisfactory. The recent cases are too important to be summarized in a foot-note. The book before us has the additional interest of coming from the pen of Judge Hare, for whatever the learned author of "Contracts" has to say is sure to be suggestive. As far as the substance of the work is concerned, the result is not disappointing. It contains an astonishing mass of material gleaned from every field of constitutional history. The work deserves particular mention for its suggestive, although sometimes disproportioned, treatment of some of the distinctively modern problems. Such is Lecture XIX., on Civil-Service Reform and the Primary System. Every here and there, also, a little note or some side remark opens up a broad field of thought in a manner somewhat diffuse, but, on the whole, invigorating. It can fairly be said that in breadth, in learning, and in suggestiveness the work is a valuable contribution to the subject.

It is to be regretted, however, that the form in which the work is presented is by no means equal to its substance. It seems to suffer from a lack of method, brought about in part, perhaps, from the unwieldy mass of material. The different lectures have no distinctive titles, so that it is sometimes difficult to tell at a glance what the main thread of the lecture is about. The divisions of the subject are not always clearly treated as a whole, although the remarks on individual cases are acute and discriminating. An example of this is the commerce clause, a subject which more than any other seems almost to demand a chronological arrangement to show its development. After a treatment of *Gibbons* v. *Ogden*, in which it is hard to see just where